

TORRENS TITLES TO MINERALS IN ALBERTA

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Almost one hundred years ago¹ Mr. Robert Torrens (as he then was), a mere layman, but one who was imaginative and tenacious to a degree, carried through the South Australian legislature, in the teeth of a most derisive and bitter opposition from members of the legal profession, a measure by which he proposed to make the technical process of conveying titles to land reliable, simple, cheap, speedy and suited to the needs of the community.² Not long afterwards, his system of land titles spread like a forest fire throughout Australia and New Zealand,³ and a spark was blown across the Pacific Ocean to Canada where his ideas were adopted widely, though sometimes tinged with the English system of registered titles,⁴ a system which was created independently of, but almost simultaneously with the Torrens system.⁵

It is lamentable, therefore, that one hundred years after

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¹ The Real Property Act, 1857 (21 Vict., No. 15, of South Australia) was passed into law January 27th, 1858, and became operative on July 1st, 1858.

² The preamble reads: "Whereas the inhabitants of the Province of South Australia are subjected to losses, heavy costs and much perplexity by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants . . .". The act proceeded in section 1 to repeal "all laws, statutes, Acts, ordinances, rules, regulations, and practice whatsoever" which were inconsistent with its provisions. See also Speeches of Robert R. Torrens, Esq. (1857) pp. 6 *et seq.*

³ Queensland in 1861; Tasmania in 1862; Victoria in 1862; New South Wales in 1862; New Zealand in 1870; and Western Australia in 1874.

⁴ Either the Torrens system or the English system or a blend of the two was adopted in Vancouver Island in 1861; in British Columbia in 1869; in Ontario in 1885; in Manitoba in 1885; and in the North-West Territories in 1886. In Ontario the Land Titles Act, R.S.O., 1950, c. 187, applies to only a fraction of the land in the province. Most land is still under a system under which deeds, not titles, are registered. The statute is the Registry Act, R.S.O., 1950, c. 336.

⁵ Originally by the Land Registry Act, 1862 (England): see now the Land Registration Acts, 1925 and 1936.

Torrens' original triumph his system should appear to have broken down in Alberta. I refer principally to the recoil from the *Turta* case,⁶ the ultimate consequences of which could well, I suppose, involve people, companies or, indeed, the government in losses of billions of dollars. And it will surprise me if the repercussions are confined to the province of Alberta. For the sake of continuity in the narrative it is desirable to recapitulate the bare bones of the *Turta* case, well known though they may be:

1903: C.P.R. became the registered owner of land.

1908: C.P.R. transferred part of the land to Podgorny, reserving coal and petroleum. The registrar wrongly cancelled the C.P.R.'s certificate of title as to the Podgorny land in full and on Podgorny's certificate wrongly showed only the reservation of coal.

1910: C.P.R.'s certificate, being fully endorsed, was cancelled and a new one issued.

Later: Turta was registered as owner, unwittingly acquiring the petroleum with his surface land.

1943: Registrar purported to correct the original Podgorny certificate and all subsequent certificates.

1947: Relying on these corrections, the C.P.R. leased the petroleum to Imperial Oil Limited.

1952-1954: Relying upon his certificate, Turta instituted proceedings for a declaration that he owned the petroleum and succeeded. Pleas of "misdescription" in Podgorny's title,⁷ that the C.P.R. held a "prior certificate"⁸ and that the registrar's corrections were effectual⁹ failed. So far, so good, but

1949-1950: Meanwhile the legislature had wantonly deprived the C.P.R. of its right to claim against the assurance fund for loss of the petroleum¹⁰ and anyhow had rendered all such claims virtually worthless.¹¹

I said it is lamentable that the system should *appear* to have failed, for there is nothing intrinsically wrong with the system itself, although the application and the administration of it have both been faulty in Alberta. This, indeed, is the opinion of a special committee of the Benchers of the Law Society of Alberta

⁶ *Canadian Pacific Railway Co. Ltd. and Imperial Oil Limited v. Anton Turta et al.*, [1954] S.C.R. 427; 12 W.W.R. (N.S.) 97; [1954] 3 D.L.R. 1.

⁷ The Land Titles Act (R.S.A., 1942, c. 205), s. 62.

⁸ *Ibid.*

⁹ The Land Titles Act, s. 174a, as added by Stats. Alta., 1949, c. 56, s. 6.

¹⁰ See the amendment to section 167 of the Land Titles Act made by Stats. Alta., 1949, c. 56, s. 4.

¹¹ The Land Titles Act, s. 167a, as added by Stats. Alta., 1950, c. 35, s. 10.

who, at the invitation of the government of the province, have been studying problems arising from the *Turta* case, for they have this to say in their report:¹²

It is the opinion of this Committee that the submissions made to it did not indicate any serious objection to the operation of the Torrens System of titles as such, and the parties who appeared did not, in the main, have serious objections to the theory of the system, which has worked reasonably well in this Province over a long period of years.

This Committee feels that the difficulties which have developed are not the result of the system itself, but have in most part arisen as a result of errors and omissions on the part of the human agents who have operated the system under the Land Titles Act.

Further confirmation that despite the *Turta* case the system itself is not at fault comes from an important article in a previous issue of this Review by Mr. Ivan L. Head, which no one who is interested in the transfer of title to land and, in particular, minerals can prudently ignore.¹³ Mr. Head makes the remarkable statement that "A person not acquainted with the Torrens principles might well wonder what magic spell is cast by a system that can at once so diminish an owner's security of title as to permit him to lose land worth many millions of dollars and yet elicit from him no attack on the essentials of the system".¹⁴

For my part I am inclined to the view that much of what happened in Alberta both before and after the *Turta* case was more than a maladministration of the Torrens system: it was something entirely foreign to the system. I was shocked to learn that faith in the efficacy of the register has been undermined.¹⁵ It is understandable that in existing circumstances practitioners are wary of relying implicitly upon the current state of the register and feel bound to revert to the old-fashioned meticulous examination of the derivative title, but their actions are not merely a retrograde step: they are a step outside the bounds of the Torrens

¹² Report of the Benchers' Special Committee on Mineral Titles (mimeographed) p. 28. The committee, which reported on October 11th, 1956, was composed of G. H. Allen, Q.C., Chairman, and S. J. Helman, Q.C., E. W. S. Kane, Q.C., R. Martland, Q.C., and S. Bruce Smith, Q.C.; with W. F. Bowker, Q.C., acting as Co-ordinator and Ivan L. Head as Secretary. It is understood that the report is to appear in the summer issue of the Alberta Law Review; in the meantime, copies can be secured from the Deputy Attorney General, Attorney General's Department, Edmonton, Alberta.

¹³ The Torrens System in Alberta: A Dream in Operation (1957), 35 Can. Bar Rev. 1.

¹⁴ *Ibid.*, p. 2.

¹⁵ In using the term "register" throughout this article I am referring to the original certificate of title in the register book.

system.¹⁶ So, too, I am disturbed—and this I say with the greatest respect—that a learned judge of Canada's highest court today doubts that the Torrens system can and should cure past defects of title,¹⁷ however arising,¹⁸ for a system under which that cannot happen is emphatically not the Torrens system. And the fact, as will appear hereafter, that no true insurance of title has existed in Alberta for some time again points to a serious backsliding from principle.

The first and fundamental recommendation of the committee, despite some opposition in the evidence they received, is that the Torrens system should continue to be used for mineral interests just as it is used for surface land, but this recommendation is made on condition that the whole law and practice are thoroughly overhauled.¹⁹ The committee considered the advisability of bringing under the act mineral rights owned by the Crown, which are handled by the Department of Mines and Minerals and are not registered in land titles offices. They are of the opinion that, if the Land Titles Act is properly administered, there is no reason why minerals cannot be dealt with as efficiently in the land titles offices as in the department. There is no logical reason why, if the Torrens system is the best system that can be devised for the registration of titles, it should not cover all surveyed lands and not simply those which are not owned by the Crown. The expense of bringing Crown lands under the act and of recording the leases, cancellations of leases, reservations, licences and other dealings with Crown lands would be tremendous and a great deal of work would be added to the already overburdened staff of the titles offices. Nevertheless the committee advise that the change is desirable and should be made gradually.

Torrens' revolutionary system of land titles was as entirely adequate for the conditions which existed when the bullock waggons of the old pioneers rumbled through the dusty streets of Adelaide as for the conditions existing in Edmonton a century later. In saying this I mean no sarcasm for I am convinced that the system is broad and flexible enough to meet the needs of the most progressive city in the world to-day if only the administration of it is moulded to modern conditions. But all too often in this age of automation, nuclear fission, supersonic speed, and all

¹⁶ Cf. Speeches of Robert R. Torrens, Esq. (1857) pp. 5, 8, 10 and 15.

¹⁷ See remarks of Rinfret C.J., dissenting, [1954] S.C.R. 427, at pp. 429-431, 436.

¹⁸ Cf. *Boyd v. Mayor etc. of Wellington*, [1924] N.Z.L.R. 1174; *Re 139 High Street, Deptford*, [1954] 1 Ch. 884.

¹⁹ The Report, p. 28.

that those things imply, there is a tendency in the people who are concerned with the Torrens system to become so infatuated with it that they are fearful of departing from the letter of it by one jot. It is ridiculous, just because Torrens in his day did not, and indeed could not, contemplate separate registered titles to freehold flats erected high above his head, or separate titles to petroleum, flowing far beneath his feet, that such titles should not to-day be freely granted, bought, sold, mortgaged or otherwise disposed of under the full blessing of the guarantee of the assurance fund. It is equally ridiculous that in practice a landowner should lose valuable powers of disposition merely because his land is brought under the act. Yet I have heard disciples of Torrens declare that titles to strata cannot be registered because they are not expressly dealt with by the *ipsissima verba* of a particular Torrens statute!

Alberta, in common with other provinces and states within the British Commonwealth, inherited the notion that *cujus est solum, ejus est usque ad coelum et ad inferos*. Indeed, almost all Torrens statutes include mines and minerals in their definition of land, usually by specific words,²⁰ but if not, by implication. In England the definition is more explicit than in some other places, including as it does "mines and minerals, whether or not held with the surface, buildings or parts of buildings (whether the division is horizontal, vertical, or made in any other way) . . .",²¹ and there are a number of express provisions for registering separate titles to distinct strata, whether they are situated above or below ground level.²² The definition of "land" in the Alberta act includes "mines, minerals and quarries".²³ The English system of registered titles is neither the Torrens system nor a derivative of the Torrens system, though fundamentally similar to it, but it is able to embrace the transfer of freehold (or leasehold) estates in parts of buildings, parts of floors, even of an air space above a bombed site, of cellars and vaults beneath the street, of real property consisting of trees without their roots, or the roots and sub-soil, of particular minerals at particular depths to the exclusion of others, or any other kind of interest in a stratum, and, whereas dealings

²⁰ See, e.g., the Real Property Act, 1900-1955 (New South Wales), s. 3; the Real Property Acts, 1861 to 1929 (Queensland), s. 3; the Land Transfer Act, 1952 (New Zealand), s. 2; the Real Property Act (Manitoba), revised, s. 2(1)(f); the Land Titles Act (Saskatchewan), revised, s. 2(10); and the Land Titles Act (North-West Territories), revised, s. 2(n).

²¹ Land Registration Act, 1925 (England), s. 3(viii).

²² *Ibid.*, s. 144(1)(xx); Land Registration Rules, 1925 (England), rr. 50, 53 to 55, 195 and 196.

²³ Land Titles Act (R.S.A., 1942, c. 205; 1945, c. 58) s. 2(1).

with some of these properties are regarded as oddities, dealings with others are a daily commonplace. Now I have read the Land Titles Act of Alberta from its first section to the last form in its schedule and I can find nothing in it which forbids the very same kind of dealings. I therefore conclude (unless these dealings are against the general substantive law of Alberta) that if the registrar refuses to register dealings of this kind he is failing in his duty.²⁴ Perhaps the legislature has not made his powers sufficiently plain. Nevertheless, I suspect that the root of the trouble in Alberta, as in some other Torrens jurisdictions, is that those responsible for the administration of the system at one time neglected the book-keeping aspect of their work.

But this particular failing, if I may be allowed to apply my native yard-stick, is unknown in England. An English registered title to freehold land is deemed to include everything upwards and downwards to an indefinite extent unless the contrary is indicated on the register, although where an applicant who seeks to bring land under the act wishes to have his mines and minerals insured by the state as well as his surface land and buildings, he must expressly ask for this to be done and prove his title to the mines.²⁵ After first registration the registered owner is as well able to dispose of a particular stratum of his land in the horizontal plane as he is free to dispose of any part of it when it is divided vertically. If he owns an office block and sells a freehold suite on the sixth floor of his building, so much of the land as has been sold is removed from his title to the entire building by what may be regarded as a "debit" entry.²⁶ The necessary "credit" entry is made by opening, in favour of the purchaser, a separate title for the particular floor, or part of a floor. Similarly, if the owner of registered land sells specified minerals lying (say) 100 feet below

²⁴ I regret that I must make this statement. I do not, of course, allude particularly to the present registrar, for whom I have the greatest sympathy in the difficult situation in which he now finds himself, nor do I mean to imply that he has done otherwise than faithfully follow the tradition of his office.

²⁵ See the Land Registration Act, 1925 (England), s. 83(5)(b). In England mines and minerals, whether severed or not, were formerly classed as "overriding interests", which correspond to the implied conditions of Alberta (The Land Titles Act (Alberta), revised, s. 61(1)). As to this see the Land Transfer Act, 1875 (England), s. 18 (repealed), as amended by the Land Transfer Act, 1897, 1st Schedule (repealed); also the Land Registration Act, 1925 (England), s. 70(1)(1). The modern position is as stated in the text.

²⁶ A transfer of part in England never involves the complete cancellation of the title out of which it issues: an entry showing the removal and the extent of it by reference to the title plan is made on the "parent" title.

the surface, a "debit" entry showing their removal will be made on his title to the land, whilst a separate title to the minerals in question will be opened in the name of the purchaser, this being the corresponding "credit".

The trouble in the *Turta* case was that the certificate issued to Turta's predecessor in title (Podgorny) contained no entry debiting the petroleum which had been reserved by the C.P.R. Similarly, there was no "credit" entry relating to the petroleum because the C.P.R.'s certificate of title was cancelled in full as to the land transferred whereas, had the transaction occurred in England, the certificate would have shown the removal of the surface land and the retention by the C.P.R. of the ownership of the petroleum. Indeed, if desired, a separate certificate of title would have been issued for the petroleum.²⁷ In other words, the English method eliminates the kind of situation that arose in the *Turta* case, because so long as the registrar ensures that there is a debit for every corresponding credit the books can be said to balance. I understand that this logical process is observed in Alberta today, but unhappily at one time the entries on the register sometimes neither balanced one another nor, indeed, even corresponded with the terms of the transfers presented for registration. Yet any other method is fraught with risk.

There is, however, one element in the *Turta* case which I do not fully comprehend, probably because of my ignorance of Canadian law and practice. If the happenings had occurred in England, then in 1908 (or, at the latest, 1910) the C.P.R. would have been expected to have noticed the cancellation in full of their certificate and presumably would have complained to the Chief Land Registrar about it and thus he would have rectified the error before Podgorny (Turta's predecessor in title) had parted with his land, that is, before any loss had been suffered by anyone. That is, however, by the way. In this connection the committee strongly urges that the registrar must have a power to correct the kind of clerical errors which occur from day to day in the land titles offices and which do not adversely affect anyone, subject to a right of appeal to the court by a dissatisfied party. The correction of errors which affect interests or rights of third parties must, they say, be left directly to the court not the registrar and this power must not normally be used against third parties who have dealt *bona*

²⁷ Land Registration Rules, 1925 (England), rr. 111 to 113, which, by virtue of the Land Registration Act, 1925 (England), s. 144(2), have the same force as if enacted by Parliament.

fide and for value on the strength of the register.²⁸ In other words, if the registrar improperly cancels a title and then discovers his error ten minutes later, he should be permitted to put it right. Indeed, it would be ludicrous if he were forced to advise the title holder that his estate had been cancelled and that he must apply to a supreme-court judge for rectification. It is the committee's opinion, however, that until rights of third parties have arisen errors can be treated as clerical,²⁹ and, of course, that being so, no question of compensation arises.

If I understand the report aright, the committee appear to have leanings towards the principles of rectification that are applied in England, where it is absolutely fundamental that rectification and the payment of compensation are complementary remedies. As a normal rule in England there can be no rectification against a registered owner in possession³⁰—in the case of minerals this would undoubtedly mean an owner who had commenced working.³¹ Thus a plea (*simpliciter*) of "prior certificate" could not arise in England. If a registered owner suffers loss through the register being rectified against him, he has a claim against the insurance fund.³² But if someone who is not a registered owner suffers loss because the register cannot by law be rectified in his favour, he too has a claim.³³

By far the most important part of the report is devoted to recommendations about the assurance fund to which, the committee say, recourse should be had for both mineral and surface claims,³⁴ although those who seek indemnity for mineral losses may not have contributed to the fund. That, however, is no fault of theirs and it is clear (though perhaps paradoxical) that non-contributing claimants are sometimes recognized as, for example, happens when an unregistered owner is deprived of land by its being wrongfully brought under the act in someone else's name, a situation which has occurred in England³⁵ and is expressly contemplated in Alberta.³⁶ But the major problem concerns the treatment of past and future losses. An Australian writer, John Baalman, has described the assurance fund in New South Wales as being "indecently solvent"³⁷ and on an impartial view this telling phrase

²⁸ The Report, pp. 34 *et seq.*

²⁹ *Ibid.*, p. 36.

³⁰ Land Registration Act, 1925 (England), s. 82(3).

³¹ Cf. the Report, pp. 45, 47.

³² Land Registration Act, 1925 (England), s. 83(1).

³³ *Ibid.*, s. 83(2).

³⁴ The Report, p. 53.

³⁵ *Re 139 High Street, Deptford*, [1951] 1 Ch. 884.

³⁶ The Land Titles Act (R.S.A., 1942, c. 205), s. 157.

³⁷ John Baalman, *The Torrens System in New South Wales* (1951) p. 56.

ought to be applied to the assurance funds in most jurisdictions, although not simply because the work of titles offices has been done so efficiently that few errors have been committed and few calls made on the funds. One justification for the phrase "indecent solvency" lies in the way in which, almost universally, assurance funds are amassed and administered. The existence of a fund is, of course, an essential and characteristic feature of the Torrens system.³⁸ Under that system the register is like a mirror which reflects fully, accurately and authoritatively all facts material to the owner's title.³⁹ If through human frailty, whether it be the mistake of a registrar, on the one hand, or the fraud of a criminal, on the other, there is a flaw in the mirror, in consequence of which an innocent person who has relied upon the reflection being a true one suffers loss, *he must be put into the same position, so far as money can do it, as if the reflection were indeed true.*⁴⁰ Thus the Torrens system is nothing more or less than a system of insurance of title to land by the government—the term "insurance" is a happier one than "assurance" because it refers to a possible risk rather than a certain one. Unfortunately, however, the business of registration is seldom conducted as a true insurance business.

In most countries which have the Torrens system the assurance fund is built up to a prescribed maximum figure through *ad valorem* contributions made at the time of first bringing land under the act,⁴¹ which may be payable at an enhanced rate if the title appears to be in any way defective.⁴² In some jurisdictions—although this seems to be anomalous—a contribution is also payable on the registration of a transmission.⁴³ In others, as in Alberta, the contribution is payable at a staggered rate on every absolute transfer mortgage or incumbrance occurring after the date of first registration.⁴⁴ In some jurisdictions, indeed, the fund is sated and no further contributions are now sought.⁴⁵ In England,

³⁸ See the Real Property Act, 1858 (21 Vict., No. 15, of South Australia), ss. 34, 35 and 96, and the Real Property Law Amendment Act, 1858 (22 Vict., No. 16, of South Australia), s. 21.

³⁹ *Registrar of Titles (Victoria) v. Patterson* (1876), 2 App. Cas. 110, at p. 117; *Assets Co. Limited v. Mere Roihi*, [1905] A.C. 176; cf. *Coventry v. Annable*, [1911] 2 W.W.R. 816 (S.C. Canada).

⁴⁰ *Registrar of Titles v. Spencer* (1909), 9 C.L.R. 641.

⁴¹ See, e.g., the Transfer of Land Act, 1954 (Victoria), s. 108 and 20th Schedule; the Real Property Act, 1900-1955 (New South Wales), s. 118 and 19th Schedule.

⁴² See, e.g., the Transfer of Land Act, 1893-1950 (Western Australia), s. 45.

⁴³ See, e.g., the Real Property Act, 1886-1945 (South Australia), s. 201 and 1st Schedule; The Real Property Act of 1861 (Queensland) s. 140 and order in council dated August 19th, 1954.

⁴⁴ The Land Titles Act (Alberta, R.S.A., 1942, c. 205), s. 153(1).

⁴⁵ E.g., South Australia and New South Wales.

no special sum is payable but any profits from the general revenue from fees charged for all kinds of applications and dealings form the fund, and the excess over £100,000 at any time is handed to the Treasury,⁴⁶ but if it should happen that the fund is insufficient to pay indemnity for any loss properly payable out of it the deficiency must be met out of the Consolidated Fund.⁴⁷ Thus in every jurisdiction these contributions to the fund constitute an insurance premium and in almost every country, state or province a surplus is regularly handed over to a reserve fund, whether it be the government's consolidated fund or otherwise. So far, all the transactions follow the pattern of normal insurance. Yet, unhappily, they depart from that pattern radically immediately a claim is made on the insurance fund!

In some instances the registered owner or other person who has suffered loss through the deprivation of his land is obliged to pursue a fruitless remedy against the person who has deprived him and only when that action has failed can he claim against the assurance fund.⁴⁸ And in most jurisdictions, including Alberta, it is necessary to bring an action against the registrar as nominal defendant and guardian of the assurance fund,⁴⁹ instead of merely notifying him of a claim in the reasonable anticipation that it will be met without needless argument.⁵⁰ It is unthinkable that such a tortuous process would be tolerated in the insurance world generally. But that is not all. In many jurisdictions, as I know from having personally questioned many holders of the office of registrar, this official reacts in a most human manner to any claim against his fund. He likes to boast that no successful claim has been paid in his time, and he tends to regard any suggestion that his department has made a mistake as an affront upon the skill of his staff. Moreover, as a public servant he fears a reprimand in the event of there being a heavy drain upon his fund.⁵¹ Furthermore, the fact that, as a general rule, the government in most jurisdictions has long since gobbled up the surplus profits of past years tends to make the task of inducing it to disgorge them again somewhat difficult.

⁴⁶ Land Registration Act, 1936 (England), ss. 4 to 8.

⁴⁷ *Ibid.*, s. 5(2).

⁴⁸ See, e.g., the Real Property Act, 1900-1955 (New South Wales), s. 126.

⁴⁹ The Land Titles Act (Alberta, R.S.A., 1942, c. 205), s. 157 (s. 168 provides a very narrow exception to the necessity of bringing action). There is something wrong when a claimant is driven to seek a *mandamus* (even though it does not lie) so as to obtain payment of an ascertained loss: *Minister of Finance of B.C. v. The King*, [1935] 3 D.L.R. 316.

⁵⁰ Cf. the Land Registration Act, 1925 (England), s. 83.

⁵¹ See footnote 24 *ante*.

What is the position in Alberta? The records show that payments into the fund have represented little more than an additional tax on transactions in land. The sum of \$3,815,645.75 has been paid in and only \$72,280.33 (that is, less than one fiftieth part) has been paid out,⁵² and the act provides for all moneys exceeding \$75,000 to be transferred to general revenue.⁵³ Something like \$3,500,000 has been so transferred.⁵⁴ The decided cases show that the statutory provisions allowing recourse to the fund, even as widened by amendments in 1935, remain hedged about by obstacles and limitations, not the least of which is the limit recently placed on claims for mines and minerals, where the maximum recoverable is the cost of the minerals plus a meagre \$5,000.⁵⁵ This is a mockery of fair dealing: *the dispossessed owner of minerals is not put in the same position, so far as money can do it, as if the mirror of title showed a true reflection.*⁵⁶ As Mr. Ivan Head says: "The lesson to be learned [from the *Turta* case] is that the aim of facility of transfer has scuttled the aim of security of title".⁵⁷ Counsel acting for the C.P.R. gave the committee some slight indication of the extent of the errors which might involve recourse to the fund. Only a small part of his client's holdings had been checked, but errors had been uncovered in the titles to forty-one quarter sections involving 6,560 acres.⁵⁸

In considering insurance of title the committee collected a great deal of valuable information from private companies in the United States which undertake this kind of risk.⁵⁹ However, it is sufficient to say that even if private guarantees of title were available in Canada; even if they could be had at a reasonable cost; even if they extended to minerals—and none of these things are so—the fact that this type of insurance is only good at the time of underwriting and affords no cover whatever against future defects is sufficient to put it out of the running in rivalry with an efficient Torrens system or any comparable system.

With regard to past losses, the committee do not think in principle that it is proper to amend the Land Titles Act retrospectively in such a way as to divest persons of existing property rights for the benefit of others.⁶⁰ But they recommend that under new

⁵² The Report, pp. 20, 21 and 50.

⁵³ The Land Titles Act (R.S.A., 1942, c. 205), s. 156(2).

⁵⁴ The Report, p. 21.

⁵⁵ The Land Titles Act (Stats. Alta., 1949, c. 56; 1950, c. 35), s. 167a.

⁵⁶ See footnote 40 *ante*.

⁵⁷ (1957), 35 Can. Bar Rev. 1, at p. 19.

⁵⁸ The Report, p. 63.

⁵⁹ *Ibid.*, pp. 49 and 50, and Schedule "A".

⁶⁰ *Ibid.*, p. 62.

legislation future claims can properly be made retrospective both as regards the time for making them and the maximum amounts recoverable.⁶¹ In this connection it must be remembered that the act was deliberately whittled down to meet the calamitous emergency that was anticipated shortly before the *Turta* case and I find it hard to believe that any government is morally justified in seeking to escape through legislation from such of its liabilities as have actually crystallized, although, no doubt, it is justified in doing so in regard to potential or inchoate liabilities. It is not a question of generosity or of parsimoniousness but of justice.

The committee further suggest that a quieting provision should be introduced into the Land Titles Act to bar actions against the fund touching errors of title actually in existence at the date of enactment unless those actions are brought within a fixed period of not less than three years. In principle some members of the committee were disinclined to adopt this suggestion but, from a practical standpoint, there is much to be said in its favour, provided that ample time is allowed for interested parties to check their titles and to take steps necessary to rectify them or to assert their claims against the assurance fund.⁶² The committee fear that the limitation period may prevent the enforcement of valid claims by persons not made aware of their rights within the time limited, but I think the proposals are a fair expedient because the result of the *Turta* case has been advertised to such an extraordinary degree that any reasonable person is given ample opportunity for action. On the other hand, it would take the registrar years of systematic searching to uncover all faults.

In regard to the amount of compensation for past error the committee describe their own suggestion as having "the main virtue of practicality rather than that of rendering full justice to those concerned".⁶³ First, they say, the government should calculate the amount which would have been in the assurance fund if no assets had been transferred to general revenue and this amount should be set aside as an "adjustment fund" and made available, so far as it will stretch, to satisfy the claims of persons who have suffered loss through errors or omissions in the land titles office occurring before the date on which this recommendation comes into force. Next, all claimants should be required to claim against this adjustment fund within three years. The registrar should be empowered to make all awards (based upon the value of the interest lost) or to refer them to the court if the part-

⁶¹ *Ibid.*, p. 63.

⁶² *Ibid.*, pp. 63, 64.

⁶³ *Ibid.*, p. 64.

ies do not agree to his deciding the question. A speedy and informal procedure should be devised. Finally, the amount awarded to each claimant should be recorded with the registrar and, when all the claims have been heard, the recorded amounts should be paid to them out of the adjustment fund, but if the aggregate of the recorded claims exceeds the amount of the adjustment fund payments should be made to each claimant *pro rata*. Any claim which is not lodged within three years and adjudicated upon within five years from the effective date is to be barred.⁶⁴ These suggestions are ingenious and fair expedients although—and this is a small point—I cannot see why a claim which, through no fault of the claimant, has not been adjudicated upon within five years should be barred.

The committee have made further important recommendations about future losses and the liability of the assurance fund for them. They see no necessity for limitation of the amounts of claims against the fund which are based on losses of surface rights, although from a practical standpoint they think that it may be necessary to impose a limit on the amount recoverable for mineral losses. Why? On this point I am respectfully inclined to join issue with them. Petroleum is as much “land” as a prairie full of cattle or a city full of buildings. The committee believe that in future separate titles should be issued for minerals. Logically, therefore, I should have thought that compensation paid for the loss of minerals should be assessed upon precisely the same basis as the loss of any other “land” and the possibility that a heavy risk may be thereby placed on the fund (or the government) is immaterial because the risk can be actuarially computed. To continue: the committee propose that compensation for mineral losses should cover:

(1) the actual cost of the lost mineral rights (or, if the claimant is a volunteer, their cost to the last purchaser for value);

(2) money fairly expended by the claimant in the development of the minerals so far as it enures for the benefit of some other person to whom the minerals are awarded or restored;

(3) damages for actual or prospective loss of profits suffered by the mineral claimant subject to a maximum of \$1,000 for each acre of mineral rights involved.⁶⁵

⁶⁴ *Ibid.*, pp. 65-66.

⁶⁵ *Ibid.*, pp. 54-55. An event of some importance has occurred since I wrote these words. At the present sitting of the Alberta legislature a bill (no. 54) has been introduced which is aimed at carrying out some of the committee's proposals by providing that:

(a) in an action against the registrar for loss or damage by reason of

Although these proposals, if adopted, would place a loser in a better position than at present,⁶⁶ they would not put him in the position that full insurance confers. It is also suggested that the government should have a lien on the minerals for moneys awarded under item (2) to secure the recovery of those moneys from the person to whom the minerals are awarded and who has benefited from the claimant's expenditure on them.⁶⁷ Applying these proposals to the facts of the *Turta* case, if Imperial Oil Limited had commenced drilling operations in good faith and without notice of any irregularity on Turta's land before Turta commenced his action, then Turta would have had no claim for any resulting income or profits derived from the operations up to the time of the commencement of his action.

At present, the limitation period applicable to an action against the assurance fund is six years from the time the party was deprived of his interest, whether or not he became aware of the error which occasioned his loss within that period,⁶⁸ although ordinarily in actions to recover land the limitation period is ten years from the date when the cause of action arises.⁶⁹ At the same time there seems to be no time limit on the power of the registrar to correct errors.

The C.P.R. failed in the *Turta* action because the court held (*inter alia*) that the error which gave the petroleum to Turta was not an exception to indefeasibility.⁷⁰ Having thus lost its valuable petroleum through a registrar's error in 1908, the C.P.R. was (in the present state of the statute) debarred from claiming against the assurance fund so long ago as the early days of the first World War! What nonsense this is! And surely many similar injustices will arise unless the law is altered? Therefore, the committee are of the opinion that all the periods of limitation of action relating to land should be uniformly fixed at ten years and that any cause of action against the fund should be deemed to arise at the time when the claimant knows of the existence of his claim.⁷¹

an error relating to mines and minerals the claimant shall be entitled, in addition to moneys paid for the minerals, to development costs and also actual and prospective losses up to a maximum of \$1,000 an acre;

(b) the assurance fund shall not be liable to a claimant under a caveat for a loss resulting from the error of a registrar.

My comments in the text (*supra*) remain unaltered.

⁶⁶ Cf. the Land Titles Act, Stats. Alta., 1949, c. 56; 1950, c. 35, s. 167a.

⁶⁷ Cf. *Ibid.*

⁶⁸ The Land Titles Act (R.S.A., 1942, c. 205), s. 167.

⁶⁹ Limitations of Actions Act (R.S.A., 1942, c. 133), s. 18.

⁷⁰ Under the Land Titles Act (R.S.A., 1942, c. 205), s. 62.

⁷¹ The Report, p. 61.

Many other ancillary but nevertheless important recommendations are made by the committee. For over forty years caveats in Alberta have been registered with a similar effect to the registration of a transfer⁷² and in regard to mineral titles they have been, for various reasons, used instead of substantive registration. Under the Torrens system and under the English registration system the function of caveats (or cautions) is to afford a temporary and even an ephemeral protection to a claim, not permanent protection of an established right. The current practice inevitably means that the reflection in the mirror of title is incomplete and that the facility with which land can be transferred is hampered. What would happen if every transferee and every mortgagee or other incumbrancer decided to resort to caveats instead of relying upon substantive registration? It would reduce the system to a farce. Nevertheless, I am bound to concede that if the Albertan deviation is what Alberta wants it would be futile to criticize it, for the Torrens system must be suited to the particular needs of the community where it is established.

The committee (S. J. Helman, Q.C., dissenting) propose that a caveator should be required to attach to his caveat the instrument it protects, or a copy of it, or alternatively that he should be required to give in the caveat clear particulars of the instrument which it protects and to file it (or a copy) within sixty days of the registration of the caveat. In default, the caveat should cease to have any effect. It is further suggested that caveators should make no contributions to the assurance fund and that, as logic requires, a caveator should have no claim against the assurance fund for losses resulting from errors or omissions of the registrar either before or after registration of the caveat. Moreover, no person claiming through, by or under a caveator, or whose claim of title to any interest in the land is incomplete without an unregistered instrument in respect of which a caveat has been filed, should have any right to claim against the assurance fund for the loss or derogation of his interest by reason of errors or omissions.⁷³

The committee wish to see the administrative machinery of land transfer improved in many ways. Thus they recommend that separate certificates should be issued for surface and for mineral titles and also in all cases where a parcel of land has been divided, thus eliminating certificates with partial cancellations endorsed

⁷² The Land Titles Act (R.S.A., 1942, c. 205) s. 145. See *Re Royal Bank of Canada and La Banque d'Hochelaga* (1914), 7 W.W.R. 817.

⁷³ The Report, pp. 57 *et seq.*

on them,⁷⁴ and that the present provisions of the Land Titles Act dealing with mineral certificates should be abrogated as being repugnant to the principles of the Torrens system.⁷⁵ Indeed, they suggest that the Land Titles Act should be completely redrafted to overcome its many redundancies and anomalies.⁷⁶ In particular, the uncertainties which spring from the decision that the intention of documents should be ascertained as at the date of their execution⁷⁷ should be studied with a view to their removal, if possible, by legislation. In order to ensure certainty of title the committee also wish to see the practice of cancellations thoroughly overhauled and made unequivocal so that no one will be required to go behind what is cancelled.⁷⁸

Two minor proposals concern the duplicate certificate of title. The first is that it should contain a survey plan of the block comprising the particular parcels included in the title.⁷⁹ The second is that the implied conditions and the exceptions to indefeasibility should be clearly printed within it.⁸⁰ Both ideas should assist in making a registered proprietor aware of his rights and his liabilities. I am bound to agree with the view that the list of implied conditions should be as short as possible,⁸¹ although the existence of a few is inevitable. And, seeing that the issue was powerfully raised in the *Turta* case, I wholeheartedly agree with the committee that the time is ripe for the legislature to declare in the most emphatic terms that in favour of a *bona fide* purchaser for value misdescription of parcels refers to a *minor* boundary question rather than to a dispute involving a vast and valuable property. But I must confess that I state my views in rather more emphatic terms than members of the committee do.⁸²

In their final recommendation the committee point out that the proper functioning of the Torrens system depends upon the efficiency of the people who administer it and that the salaries offered must be such as to attract the right kind of staff for this

⁷⁴ *Ibid.*, p. 66.

⁷⁵ *Ibid.*, p. 72.

⁷⁶ *Ibid.*

⁷⁷ *Borys v. C.P.R. and Imperial Oil Limited.*, [1953] A.C. 217; (1953), 7 W.W.R. (N.S.) 546.

⁷⁸ The Report, p. 69.

⁷⁹ *Ibid.*, p. 68.

⁸⁰ *Ibid.*, p. 67: see the Land Titles Act (R.S.A., 1942, c. 205), ss. 61, 62.
⁸¹ The Report, p. 40; John Baalman, *The Torrens System in New South Wales* (1951) pp. 151 *et seq.* The list of "overriding interests" in the English Land Registration Act, 1925, s. 70, looks a formidable one, but many of the interests no longer subsist and in practice most of the remainder either appear on the register or are discoverable by inspection of the land. In particular, statutory charges cannot be enforced unless protected on the register: Land Registration Act, 1925 (England), s. 59(2). Cf. the alarming position under *S. E. Drainage Board v. Savings Bank of S.A.* (1939), 62 C.L.R. 603.

⁸² The Report, p. 41.

important public work.⁸³ Without doubt, disastrous situations like that resulting from the *Turta* case may arise not merely through repeated mistakes of a clerk in the land titles office (for which the registrar himself can never escape blame) but also through too great a rigidity in the act under which the registrar is required to operate, which, in so far as it deprives him of discretion, will tend to engender ultra-conservatism and a failure to develop a consciousness of the very wants the system is intended to satisfy. An efficient registrar must keep his finger on the pulse, anticipating the mistakes that are likely to be made and in fact are being made by his staff and must immediately counteract them. In short, those in charge of land titles offices should be not only sound lawyers but also competent administrators, equipped with business acumen, constantly alive to the needs of the community they serve and willing at all times to bend their practices to fit new situations. Ideally, a titles office is an insurance organization in which the state insures at their *full* value all titles to land on a business-like basis (showing neither loss nor excessive profit) for the benefit of the householder, the farmer, the oil company or any other owner of any interest in land. Although this statement goes farther than the ideas which Torrens conceived a century ago, I am sure he would have been the first to approve of any move to keep up with modern conditions.

A Great Judge

The distinctive quality of Brandeis is that with immense resourcefulness he found ways to build the ancient ideas we profess into the structure of twentieth-century America. His power derived from a fusion of three traditions: the Biblical tradition, with the moral law of responsibility at the core; the classical tradition, with its stress on the inner check, the law of restraint, proportion, and order, achieved by working against a resisting medium; and not least, the common-law tradition which he learned in this university [Harvard], teaching that the life of the law is response to human needs, that through knowledge and understanding and immersion in the realities of life law can be made, in Mansfield's phrase, to work itself pure. This harmonious fusion of traditions accounts for the essential simplicity beneath the manifold expressions of his gifts. It explains, too, why his real significance on this centennial anniversary goes beyond this or that measure identified with his name. Like all great teaching, as has been said of history itself, his meaning is not to make us clever for another time, but wise for always. (Paul A. Freund, *Mr. Justice Brandeis: A Centennial Memoir* (1957), 70 Harv. L. Rev. 769, at pp. 791-792)

⁸³ *Ibid.*, p. 74.